Supreme Court, U.S.
FILED

No. 931255 DEC 23 1993

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
COUNTY OF MORRIS

OCTOBER TERM, 1993

COUNTY OF MORRIS,

Petitioner,

v.

JEAN PIERRE PHILIPPEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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QUESTIONS PRESENTED

1. Whether the non-funding for fifteen (15) years by the New Jersey State Legislature of portions of its Public Defender Act which requires the Public Defender to provide transcripts of municipal court appeals for which a defendant may be subject to imprisonment, is a violation of the XIV Amendment's due process clause, since the non funding is a violation of the New Jersey Constitution?

PARTIES TO THE PROCEEDING

The parties to the proceedings below included petitioner, County of Morris (appellant below) and the Defendant, Jean Pierre Philippen, who was represented by assigned counsel, Allen Hantman, Esq. on the appeal at the Appellate Division of the Superior Court of New Jersey, and the Morris County Prosecutor, representing the State of New Jersey, who was represented by the Morris County Prosecutor, Joseph Connor, and the office of the Public Defender, who was represented by Caludia Van Wyck at the Appellate Division of the Superior Court of New Jersey and the Supreme Court of New Jersey.

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In The Supreme Court of the United States

October Term, 1993

(No._____)

COUNTY OF MORRIS,

Petitioner,

v.

JEAN PIERRE PHILIPPEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Petitioner, the County of Morris, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New Jersey Supreme Court, entered in this proceeding on November 9, 1993 which denied certiorari of the final judgment of the Appellate Division of the Superior Court of New Jersey

which upheld the decision of the Law Division of the Superior Court of New Jersey.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court (Pet. App. 1a) which denied certioriari is unreported. The opinion of the Appellate Division of the Su erior Court of New Jersey (Pet. App. 3a) is also unreported. The opinion of the Superior Court of New Jersey, Law Division is unreported. Pet. App. 6a. The opinion of the Superior Court of New Jersey, Law Division, when

it reconsidered its decision is also unreported. Pet. App. 62a.

JURISDICTION

The opinion of the Supreme Court of New Jersey was entered on November 9, 1993. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a). The United States Constitution Amendment 14 is set forth at Pet. App. 84a.

STATUTES AND REGULATIONS INVOLVED

The New Jersey Constitution Art. 4, §7, par. 4 is set forth at Pet. App. 88a.

N.J.S.A. 2A:158A-5.2 is set forth at Pet. App. 89a.

N.J.S.A. 2A:158A-5 is set forth at Pet. App. 90a.

N.J.S.A. 39:4-50 is set forth at Pet. App. 91a.

New Jersey Court Rule 3:23-8(a) is set forth at Pet. App. 94a.

STATEMENT OF THE CASE

Following this court's decision in **Mayer v. City of Chicago**, 92 S. Ct. 410 (1971), which clearly found that a defendant's right to transcripts for purposes of appeal were not limited solely to cases of imprisonment, **Mayer** at 415, the State of New Jersey passed N.J.S.A. 2A:158A-5.2, Pet. App. 89a, as a supplement to N.J.S.A. 2A:158A-5 which was enacted in 1967. Pet. App. 90a.

N.J.S.A. 2A:158A-5 in pertinent part provides:

Duties of public defender

It shall be the duty of the Public Defender to provide for the legal representation of any indigent defendant who is formally charged with the commission of an indictable offense.

All necessary services and facilities of representation (including investigation and other preparation) shall be provided in every case.

Representation as herein provided for shall include any direct appeal from conviction and such post-conviction proceedings as would warrant the assignment of counsel pursuant to the court rules.

N.J.S.A. 2A:158A-5.2 in pertinent provides:

The Public Defender shall in the manner prescribed by P.L. 1967, c. 43 (C. 2A:158A-1 et seq.) provide for the legal representation of any person charged with a disorderly persons offense or with the violation of any law, ordinance or regulation of a penal nature where there is a likelihood that the persons so charged, if convicted, will be subject to

imprisonment or, in the opinion of the court, any other consequence of magnitude.

L. 1974, c. 33, §3.

The New Jersey statute concerning driving while under the influence of alcohol, N.J.S.A. 39:4-50, places a defendant convicted of that offense at risk of facing a jail term. Pet. App. 91a.

39:4-50. Operating or allowing operation by person under influence of liquor or drugs; penalties, alcohol education or rehabilitation; collection of driver's license; rights of discovery; intoxicated driver resource centers

(a) A person who...operates a motor vehicle with a blood alcohol concentration of 0.10% or

> more by weight of alcohol in the defendant's blood...shall be subject:
> (1) For the first offense, to a fine of not less than $250.00 nor more than $400.00 and...in the discretion of the court, a term of imprisonment of not more than 30 days.

The respondent, Jean Pierre Philippen was convicted of N.J.S.A. 39:4-50 in Denville Township Municipal Court.

On May 22, 1992, the Superior Court of New Jersey, Law Division, heard the request of respondent, Jean Pierre Philippen for a free transcript, and the cross-motions filed by Morris County and the New Jersey Public Defender for the other party to bear the cost of

the transcript. On May 22, 1992, the Superior Court of New Jersey, Law Division ordered the County of Morris rather than the New Jersey Public Defender to bear the cost of a transcript of proceedings. Pet. App. 6a.

Morris County filed a motion for reconsideration of the court's May 22, 1992 order and on June 26, 1992, the Law Division denied Morris County's motion for reconsideration Pet. App. 62a. On August 7, 1992, the trial court supplemented its decision by a letter to the attorneys in the case Pet. App. 92a.

Despite the New Jersey Legislature having enacted N.J.S.A. 2A:158A-5.2 as a statute for fifteen (15) years, the New Jersey Legislature has never funded the statute. Pet. App. 89a.

STAGES WHEN FEDERAL QUESTIONS RAISED.

Morris County argued at the June 26, 1992 hearing that this failure to fund violated the New Jersey Constitution, and, thus resulted in a taking of Morris County's property by the State of New Jersey in violation of Morris County's XIV Amendment rights. Pet. App. 97a.

The trial judge required the County to pay the costs, of Defendant Philippen's transcript, but did that solely because he found that there was no effective statute in place for the funding of the defense of this indigent. The trial judge decided that he was fashioning a remedy even though there is an unfunded State statute in effect, for fifteen (15) years, to remedy Defendant Philippen's constitutional right to a transcript when he faced a possible jail term. The trial judge recognized this difficulty when he found:

> **"The reality is, the statute is not so much that it's been repealed, it's not be repealed, it's still on the books, it**

still presumably represents the theoretical policy of this State, but it hasn't been funded. It is not a reality. There is nothing that can be done about it.

The Public Defender cannot undertake defenses if he has no resources at all. It's not a question of apportioning resources. He has no resources given to him, zero resources for doing this job, so he can't do it. I don't know, **I don't regard that as repeal of a statute by implication, I regard that as nonexistence of a statute**. And the problem remains that the people have to be defended, they have a constitutional right to be defended. We have -- and **the Supreme Court has fashioned the basic remedy, I have filled in one of the gaps in it, that's all I'm doing**. That's it. You'll have to get the Appellate Division or the Supreme Court to take it beyond

that, Mr. Kevitz. Good luck." Pet. App. 80a.

On August 3, 1993, oral argument was heard in the above matter and the Appellate Division rendered its decision on August 12, 1993 Pet. App. 3a upholding the Law Division's judgment; including its supplemental opinion of August 7, 1992, which was unaddressed at oral argument before the Law Division. Pet. App. 5a.

On November 9, 1993, the New Jersey Supreme Court denied certification Pet. App. 1a.

New Jersey Art. 4, §7, par. 4 was enacted in September 28, 1875 and provides:

> **4. Content and title of laws; laws adopting compilations or revisions of statutes.**
>
> To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title. This paragraph shall not invalidate any law adopting or enacting a compilation, consolidation, revision or rearrangement of all or parts of the statutory law.

Morris County first argued in its brief for reconsideration before the Superior Court of New

Jersey, Law Division that despite the nonfunding of the Office of the Public Defender, if the defendant is entitled to the preparation of transcripts, the cost for the preparation of the transcripts should be paid by the Office of the Public Defender rather than by the County of Morris. Morris County specifically indicated that the repeal of N.J.S.A. 2A:158A-5.2 by non-funding was a violation of New Jersey Constitution, Art. 4, §7, par. 4 and United States Constitution Amendment XIV (Pet. App. 97a) and continued those arguments at the Appellate Division (Pet. App. 104a) and Supreme Court (Pet. App. 113a).

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because of the importance of the issue. **Burson v. Freeman**, 112 S.Ct. 1867 (1992). When seeking a Writ of Certiorari of a State Court decision, one must always remember the words of Justice Brennan:

> **"It is important, however, to stress how infinitesimally small is the class of cases as to which the state courts may have to share judicial power with the Supreme Court because they raise federal questions.** I suppose the state courts of all levels must decide annually literally millions of controversies which involve vital issues of life, liberty, and property of human beings of this Nation.

Even the yearly total of decisions handed down by the highest courts of the 50 States must run into the tens of thousands. Yet only a dribble of this vast number raises any federal question. Last Term [the 1958 Term] in only 792 state cases did losers knock on the Supreme Court's door and protest that a state court had erroneously decided a federal question. Nine out of 10 of even that scant number did not get in. We turned away 734 or 93%. We could find only 58 state court decisions of federal questions which justified our inquiry into the merits of the disposition of those questions by the state courts. We heard and decided 30 of those cases. We affirmed 13 of the state judgments and reversed 17. Contrast the 30 state cases argued and decided with the 75 cases from the federal courts which were argued and decided. We reviewed over twice as many federal court decisions.

> The state decisions reviewed were from the courts of 17 States. The highest number from any one state court was six; only a single case came from each of 10 States." Mr. Justice Brennan State Court Decisions and the Supreme Court, 31 Penn. Bar Assn. Q. 393, 395-396 (1960).

The New Jersey Supreme Court has clearly recognized that under New Jersey case law when constitutionally mandated, funds must be allocated. See **Robinson v. Cahill**, 67 N.J. 333, 354-55, 339 A.2d 193, cert. denied, 423 U.S. 913, 96 S.Ct. 217, 46 L.Ed.2d 141 (1975) and **Div. of Youth & Family Serv. v. D.C.**, 118 N.J. 388 (1990).

Nevertheless, even though it was an undisputed finding by the trial court that "there being no effective statute in place for the funding of these defendants", the reality is, the statute is not so much that it's been repealed, it's not be (sic been) repealed, it's still on the books, it's still presumably represents the theoretical policy of this State, but it hasn't been funded. It is not a reality. There is nothing that can be done about "it." Petitioner, Morris County respectfully submits that the fact still remains that the statute, by never being funded is de facto repealed by the appropriations bill in violation of N.J. Constitution Art. 4, §7, par. 4. It is

submitted that the New Jersey Constitution is the law of the land in New Jersey, and no matter what disagreement there may be as to the scope of due process, the minimal due process that a person is entitled to receive are those that are guaranteed by a State Constitution.

Many years ago Chief Justice Waite in **Walker v. Sauvinet**, 92 U.S. 90, (1875) stated: "Due process of law is process due according to **the law of the land**. This process in the states is regulated by the law of the state."

Lower federal courts, but not this Court have recognized, from the duty of the citizen to obey the laws of the state **arises the corresponding right of the citizen to insist that the state comply with its own laws, and to demand, in the language of the Constitution of the state, that he be not deprived of his life, liberty, or his property, unless by the judgment of** his peers or **the law of the land.** United States v. Ashe, 2 F.2d 735, 742 (W.D. Pa 1924).

The case at bar case clearly presents undisputed facts, showing a violation of a state constitution, New Jersey Constitution Art. IV §7, par. 4, and a chance for

this Court to expand upon the eloquent holding of Daniel Webster many years ago in **Trustees of Dartmouth College v. Woodward**, 4 Wheat. [17 U.S.] 518, 4 L.Ed. 629, at page 581:

> "* * *By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. **The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. ***"

To deny certification in this case, is to deny the uncontroverted fact that the failure of the New Jersey

Legislature to fund N.J.S.A. 2A:158A-5.2 was a de facto repeal,done in violation of Morris County's rights under N.J. Constitution Art. 4,§ 7, par. 4, resulting in a taking of property in violation of a State Constitution. It is more importantly a chance for this Court to clearly indicate that a taking of property in violation of a State Constitution is inherently a deprivation of a person's most fundamental due process rights under the United States Constitution.

I

THE TRIAL COURT'S DECISION THAT LACK OF FUNDING OF N.J.S.A. 2A:158A-5.2 VOIDS THE STATE OF NEW JERSEY'S DUTY TO PAY FOR THE OFFICE OF PUBLIC DEFENDER'S COSTS IS CONTRARY TO THE UNITED STATES CONSTITUTION

Despite the trial court's decision concerning the anomaly of lac of funding of **N.J.S.A.** 2A:158A-5.2 Pet. App. 73a-4; Pet. App. 75a 8; and Pet. App. 76a-18; Pet. App. 81a-13, it is respectfully submitte that the trial court's decision did not give proper deference to th leading New Jersey case for the premise that the failure to appropriat suspends a statute, **City of Camden vs. Byrne** 82 N.J. 133, 15

(1980), and its effect on the case at bar or the New Jersey Constitution. Instead, the trial court merely found that **N.J.S.A.** 2A:158A-5.2 imposed no duty on the Office of the Public Defender (OPD), Pet. App. 74a.

In the **City of Camden vs. Byrne**, supra, (hereinafter Camden) the New Jersey Supreme Court did address the issue of the effect of nonfunding of a statute under an appropriations bill. Nevertheless, neither that case, nor any other New Jersey case that this writer is aware of, addresses the constitutionality pursuant to Article 4 Section 7 Paragraph 4 of the New Jersey Constitution (hereinafter Article 4) of an appropriations bill effectively repealing a constitutionally mandated statute due to nonfunding, such as **N.J.S.A.** 2A:158A-5.2.

The New Jersey Supreme Court found in the Camden Case supra at pages 154-155 that:

> **"Although there generally exists a strong presumption against any implied negation of statutory enactments, this presumption may be overcome when there is a clear showing that two legislative measures are patently repugnant or inconsistent....The earlier statutes cannot coexist with the enacted appropriation and, consequently, must be deemed to be suspended by adoption of the later appropriation acts.** Bruck v. The Credit Corp., 3 N.J. 401, 408-409 (1950); see United States v. Dickerson, 310 U.S. 554, 555-556, 60 S.Ct. 1034, 1035, 84 L.Ed. 1356, 1359 (1940) (statute providing for reenlistment bonus suspended by subsequent failure to appropriate); Friends of the Earth v. Armstrong, 485 F.2d 1, 8-9 (10 Cir.1973), cert. den. 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120 (1974); contra, Flanders v. Morris, 88 Wash. 2d 183, 558 P.2d 769 (S.Ct. 1977) **(appropriation bill cannot "abolish" existing law).**

Unfortunately, a review of the cases cited by the New Jersey Supreme Court in the **Camden** case, supra at 154 indicate that none of them address the argument that the appropriation bill, if it suspended law, or repealed a statute, would not be in violation of the New Jersey Constitution. However, an extremely interesting argument is made in **Flanders v. Morris**, 558 P.2d 769 (S.Ct.1977) cited in the **Camden** case, supra at 155 where the Washington Supreme Court found that an appropriation bill cannot abolish existing law based upon the Washington State Constitution. The Washington Supreme Court clearly found in **Flanders v. Morris**, supra at pages 772 and 773:

> ..."It is obvious why a legislator would hesitate to hold up the funding of the entire state government in order to

prevent the enactment of a certain provision, even though he would have voted against it if it had been presented as independent legislation.

Article 2, section 19 of our state constitution has a dual purpose: (1) to prevent "logrolling", or pushing legislation through by attaching it to other necessary or desirable legislation, and (2) to assure that the members of the legislature and the public are generally aware of what is contained in proposed new laws. In **State ex rel. Washington Toll Bridge Authority v. Yelle,** 54 Wash.2d 545, 550-51, 342 P.2d 588, 591 (1959), we quoted language which explains the need for this constitutional provision:..."

An appropriations bill which "defines no rights" certainly cannot abolish or amend existing law. It cannot add restrictions to public assistance eligibility and still be said to define no rights. The proper legislative procedure is to enact separate, independent, properly titled legislation....

We next deal with the constitutional challenge made under Const. Art. 2, section 37. The reason for requiring amendatory legislation to set out the statute in full was stated in the 1959 **Washington Toll Bridge Authority** case, quoting from **State ex rel. Gebhardt v. Superior Court**, 15 Wash. 2d 673, 685, 131 P.2d 943, 949 (1942):

> 'The section of our constitution above referred to was undoubtedly framed for the purpose of avoiding confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes or different portions of the same volume. Such a provision, among other things, forbids amending a statute simply by striking out or inserting certain words, phrases or clauses, a proceeding formerly common, through which laws become complicated and their real meaning often

> difficult of ascertainment. The result desired by such a provision is to have in a section as amended a complete section, so that no further search will be required to determine the provisions of such section as amended.'"

Our New Jersey Constitution, very much like the Washington Constitution, and many other State Constitutions, and unlike the United States Constitution, contains a constitutional provision that prevents "logrolling". That section of the Constitution is Article 4 Section 7 Paragraph 4 (Article 4) which clearly states:

> "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, **every law shall embrace but one object, and that shall be expressed in the title**. This paragraph shall not invalidate any law adopting or enacting a

> compilation, consolidation, revision, or rearrangement of all or parts of the statutory law."

It is respectfully submitted that the provisions of Article 4 were not properly addressed by any lower Court, or by the New Jersey Supreme Court, in **Camden**, supra or in the case at bar. It is respectfully submitted that the decision of this Court while properly based upon the issues litigated in the **Camden**, case supra, should be reexamined in light of the New Jersey Constitutional requirement of Article 4.

If an appropriations bill, can in one fell swoop, as is indicated in the previous New Jersey decisions, suspend legislation, unsuspend other legislation, and repeal bills, then the New Jersey Legislature is

not merely acting in violation of Article 4, but in one simple act, by the adoption of an appropriation bill, is recodifying the entire State of New Jersey each year. Such an interpretation of the effect of an appropriations bill was exactly what was being disapproved by the New Jersey Constitutional enactment of Article 4.

Additionally, while **City of Camden v. Byrne**, 82 N.J. 133 (1980) may stand for the premise that the failure to appropriate suspends a statute, when the funds are nonconstitutionally mandated, that case must be reconciled with the later decision by our Supreme

Court in **Div. of Youth & Family Services v. D.C.**, 118, N.J. 388, 399-400 (1990) which further clarified the holding in **Camden** and held:

> "As we stated in **City of Camden v. Byrne**, 82 N.J. 133, 148-49, 411 A.2d 462 (1980):
>
> > "New Jersey courts have consistently adhered to the principle that the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government. There can be no redress in the courts to overcome either the Legislature's action or refusal to take action pursuant to its constitutional power over state appropriations. (Citations omitted)....

Petitioner Morris County respectfully submits that the Courts below ignored the violation of the New Jersey Constitution and hence

the violation of the United States Constitution of XIV Amendment when it upheld the trial court's finding:

> "That is why I have directed the County to do that. None of the recent Appellate Division or Supreme Court decisions with respect to the furnishing of ancillary services, like expert witnesses, transcripts to Superior Court indigent defendants charged with crimes who are effectively covered by the Public Defender, even though some of the work is farmed out, none of those cases are applicable. There simply is no controlling state law, decisional law on what should be done about funding a transcript cost of indigent defendants. (Pet. App. 78a).

This decision, ignores the New Jersey Supreme Court's recent decision and rationale in **State v. Arenas**, 126 N.J. 504, 506-507, (1991) when the Court unequivocally found:

> "...**that the OPD (Office of Public Defender) is responsible for paying the costs of necessary ancillary services for indigent defendants**, even when those defendants are represented by outside counsel. In so holding, we recognized the intent of the Legislature to provide for the representation of **all** indigent defendants through a unitary, centralized system--the Office of the Public Defender. Id. at 490. **In order to maintain the centralized nature of New Jersey's system, we held that the OPD, and not the counties, should pay for services necessary to the defense of all indigents.**"

This Court should issue a writ, since the decision below finds that the counties and not the OPD should pay for some services necessary to the defense of all indigents, (1) without a statute to that effect and (2) contrary to a statute that requires the OPD to and New Jersey decisional law to pay for same.

Whatever disagreement there may be as to the scope of the words "due process of law" certainly the starpole that should guide the judiciary is that it minimally requires the written law to be followed.

Certainly the minimum due process that is required is to follow the law as written and found in **N.J.S.A.** 2A:158.5-2 which requires constitutionally mandated legal services be provided to indigents.

Those services are not a luxury item, but a service required by the United States and New Jersey Constitution, in order to comply with the most fundamental due process right, the right of adequate counsel.

II

NEW JERSEY COURT RULE 3:23-8(a) DOES NOT EFFECT THE ISSUE, PRESENTED TO THIS COURT OF WHETHER DUE PROCESS MINIMALLY ENCOMPASSES WHATEVER RIGHTS A PERSON HAS PURSUANT TO ITS STATE CONSTITUTION.

Subsequent to the decision in the above matter, the trial judge sent Morris County and the OPD a letter of clarification of his decision based upon New Jersey R. 3:23-8(a). Pet. App. 94a.

As a general rule of New Jersey law, a court rule will control over a statute:

> "We therefore conclude that the rule-making power of the Supreme Court is not subject to overriding legislation, but

> that it is confined to practice, procedure and administration as such." Winberry v. Salisbury, 5 N.J. 240, 255 (1950).

It is respectfully submitted that funding of **N.J.S.A.** 2A:158A-5.2 however, is not an area of practice, procedure or administration of court, but is a matter of funding within the legislature's expertise. As such, funding of **N.J.S.A.** 2A:158A-5.2 should be determined without reference to the New Jersey rules of court.

Any attempt by a court to countermand this legislative act, by court rule, it is respectfully submitted, would not only violate the doctrine of separation of governmental powers, but also violate New Jersey case law mandating courts not to legislate, as well as the holding of **Winberry v. Salisbury**, supra, that the New Jersey Supreme

Court's rule-making power is not subject to overriding legislation, unless it is confined to the questions of practice, procedure and administration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD F. APPELT,
MORRIS COUNTY COUNSEL

By:

Ronald Kevitz
First Assistant Morris
County Counsel

Dated: December 16, 1993

APPENDIX

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SUPREME COURT OF NEW JERSEY
C-317 September Term 1993
37,385

STATE OF NEW JERSEY,

Plaintiff,

v. ON PETITION FOR CERTIFICATION

JEAN PIERRE PHILIPPEN,

Defendant-Respondent.

(COUNTY OF MORRIS -Petitioner)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1375-91 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert L. Clifford,

Presiding Justice, at Trenton, this 8th day of November,

1993.

/s/STEPHEN TOWNSEND
CLERK OF THE SUPREME COURT

**I certify that the
foregoing is a true
copy of the original
on file in my office.**

**/s/Stephen Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY**

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1375-91T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEAN PIERRE PHILIPPEN,

Defendant-Appellant.

Argued August 3, 1993 -- Decided August 12, 1993

Before Judges Gaulkin and A.M. Stein

On appeal from the Superior Court, Law Division, Morris County

Allen Hantman argued the cause for appellant (Morris and Hantman, attorneys).

Joseph Connor, Jr., Assistant Prosecutor, argued the cause for respondent State of New Jersey (W. Michael Murphy, Jr., Morris County Prosecutor, attorney).

Ronald Kevitz, First Assistant County Counsel, argued the cause for respondent County of Morris (Howard F. Appelt, II, Morris County Counsel, attorney).

PER CURIAM

Defendant was convicted in the Township Municipal Court of drunk driving (N.J.S.A. 39:4-50) and refusal to submit to a breathalyzer test (N.J.S.A. 39:4-50-2). On his de novo appeal, the Law Division found him not guilty of drunk driving but guilty of refusal to submit to the test. Defendant appeals, urging that the proofs showed that the breath samples were not taken "in accordance with" the provisions of N.J.S.A. 39:4-50.2(a).

We find the contention to be clearly without merit. R. 2:11-3(e)(2). The record, including the videotape, amply supports the finding of then - Judge Daniel R. Coburn that defendant "did not take that test as he was instructed to" and that "a failure to perform is no different than a failure to even

take it." The examining officer cannot be said to have been under any obligation to analyze the inadequate sample produced by defendant.

The County of Morris has joined as a respondent on the appeal to challenge a May 22, 1992 order of Assignment Judge Reginald Stanton determining that "defendant is indigent and entitled by law to counsel" and directing that "the County of Morris will bear the cost of a transcript of proceedings in the Superior Court." We affirm that order substantially for reasons expressed by Judge Stanton in (1) his May 22, 1992 oral opinion, (2) his April 1, 1992 letter opinion in State v. Barbara Busch[1], referred to in the May 22 opinion, (3) his June 26, 1992 oral opinion denying reconsideration and (4) his August 7, 1992 supplemental letter opinion.

The judgment of conviction is affirmed, as is the May 22, 1992 order directing the County of Morris to pay the cost of the transcripts.

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[1]We today dispose of the County of Morris's app from the similar order in State v. Barbara Busch A-4998-91T2.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY

Ap. No. 156-89

STATE OF NEW JERSEY, :

Complainant, :

-vs- : Consolidated Motions

JOYCE GATTI, :

Defendant. :

- - - - - - - - - - - -

STATE OF NEW JERSEY, : Ap. No. 2211-91

Complainant, :

-vs- :

JEAN PIERRE PHILLIPEN:

Defendant.:

- - - - - - - - - - - -

Place: Morris County Courthouse
Morristown, New Jersey

Date: May 22, 1992

BEFORE:

HON. REGINALD STANTON, A.J.S.C.

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TRANSCRIPT ORDERED BY:
W. Randall Bush, Esq.

APPEARANCES:

HOWARD F. APPELT, II, ESQUIRE
BY: W. RANDALL BUSH, ESQUIRE
Morris County Counsel
Appearing for the County of Morris

JOEL M. HARRIS, ESQUIRE
Deputy Public Defender
Appearing for the Office of the Public Defender

TERENCE E. HEADD, C.S.R.
Morris County Courthouse
Morristown, New Jersey

THE COURT: Now, Mr. Bush and Mr. Harris.

Now, as Yogi Berra would say: Deja vu all over again.

Now, we have two cases. We'll deal with them both together because they involve the same issue. One is State versus Joyce Gatti, G-A-T-T-I, and the other is State versus John Pierre Phillipen, P-H-I-L-L-I-P-E-N. And in both these cases there's a motion being made by the county counsel to have the costs of preparation of transcripts for use on appeal picked up by the Public Defender rather than by the county.

There are counsel appointed for the defendants. They have not

appeared. I guess they don't really care. They just want to get a transcript.

MR. HARRIS: Right. I would agree with that.

MR. BUSH: May it please the Court, our office has received a letter on the John Pierre Phillipen matter indicating that as the. Appellate Division has ordered the matter of assigned counsel be brought back to this Court for assignment, and at that point their firm would not be filing appearance or any papers in this regard.

THE COURT: Okay.

MR. BUSH: That was a letter dated May 13th.

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THE COURT: From whom?

MR. BUSH: Brain P. S. McCabe, who had been the assigned Counsel for Mr. Phillipen.

THE COURT: The Appellate Division relieved him.

MR. BUSH: That is correct, your Honor.

THE COURT: And I'm, -- what I do, I have to assign counsel. That's clear. And we have a system for assigning counsel. The criminal division manager has prepared an order for me to sign, and Allen Hantman is the person on the list to be assigned.

So I haven't appointed him yet, but today when I finish dealing with

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this transcript problem, I'm going to appoint Mr. Hantman. But he doesn't care in any event.

I don't mean to reflect that he's not interested, he is, he's a very interested, concerned attorney. He'll do a good job on the case. But it's a matter of indifference to assigned counsel whether the transcript is provided at county expense or provided at the expense of the Office of the Public Defender. They just want to get the transcript.

So they're not here and it's not important that they're not.

Let's hear from you first, Mr. Bush. We'll deal with the both cases

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simultaneously because the issue is precisely the same. It is, of course, an issue that we recently addressed in the case of State versus Barbara Bush, but we'll take another look at it.

MR. BUSH: Thank you, your Honor. Just for the record, there are two charges that are involved with the motions before the Court today. In the matter of State versus John Pierre Phillipen, that defendant was found guilty of violation of N.J.S.A. 39:4-50.1, which is refusal to submit to the Breathalyzer, and a charge of drunk driving.

In the matter of State versus Joyce Gatti, that defendant was found guilty of a violation of N.J.S.A.

39:4-50, drunk driving itself.

THE COURT: The significant thing, of course, is that both involve loss of license. That's a consequence of magnitude and entitles them to assigned counsel.

MR. BUSH: Correct, your Honor. I just wanted to make the Court aware of the distinction in terms of the underlying charges on the matters.

THE COURT: Sure.

MR. BUSH: Your Honor, I know we've visited and are now revisiting this particular issue. However, I believe that this Court has to focus in on the operative provisions set forth by the Supreme

Court in their decisions in State versus Arenas and In re: Cannady, when Court on December 19th, 1991 decided that the office of the Public Defender through the enabling requirements of the law must afford services through representation and/or ancillary services to indigent, declared indigent defendants.

The statute involving the Office of the Public Defender's responsibility initially dealt with indictable offenses.

However, after the Supreme Court's dealing with the issue of indigent defendants in the Court system in the State of New Jersey in Rodrigues versus Rosenblatt found that, in

Rodrigues the Court found that the assignment of counsel was a fundamental responsibility of the Court.

And after that, the Legislature went and enacted an amendment to the Public Defender Act where it specifically dealt with not the tier of indictable but went to the realm of non-indictable and into the area that the Court just pointed out: Likelihood of imprisonment or an offense constituting a consequence of magnitude.

And in that realm, the Legislature said the Office of the Public Defender under the Public Defender Act has to take on the responsibility of an

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Indigent defendant in that regard.

The Public Defender has submitted, what I received yesterday, a letter brief dealing with this operative issue of whether or not N.J.S.A. 2A:158 A-5.2 which the county claims is the enabling statute, requiring the Public Defender in this matter to provide transcripts for the indigent defendants, and whether or not that is the case.

The Public Defender cites the matters of In re: Spann, contempt; Norton versus State; and State versus Monahan.

However, respectfully, your Honor, those cases and the pronouncements in those cases are not dispositive of the

issue before this Court. Rather, they bolster the argument being presented by the county before this Court.

Those cases said the statute which I cited 5.2 of the Public Defender Act require counsel to be assigned. And when counsel is assigned by way of the Public Defender Act that brings into the realm of all services to be provided not only assigned counsel but all ancillary services going along with it.

The Public Defender is attempting to dissect what its responsibilities are. And respectfully, your Honor, the Supreme Court in Aranas did not allow a dissection.

They pointedly said all indigent

defendants in the State of New Jersey, once declared so, are afforded the services of either an attorney, whether it be the Public Defender or assigned counsel under the Court rules; but more importantly, ancillary services going along with the defendant are part and parcel of that assignment.

The Supreme Court didn't say: Well, 5.2 hasn't been financially dealt with in the Legislature, and therefore, it's not applicable. They didn't go that dissection. They didn't fall short of it. They said all indigent defendants are now the responsibility of the law under the Office of the Public Defender Act,

because as the Supreme Court pointed out in Arenas, any other previous statute, pointedly 2A:152-17, predated the Public Defender Act and it's no longer part and parcel of the system.

Rather, the Court indicated 2A:152-17 was part and parcel of an antiquated system that was obsolete in the State of New Jersey and is obsolete because the Legislature has moved on with the Public Defender Act by the additional amendment bringing the representation of indigent defendants down to the realm of municipal violations where there is a likelihood of imprisonment or a consequence of magnitude.

The Public Defender, in attempting

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to say that they are not responsible under the law or under Court rule to provide these services, in saying that, that doesn't automatically compel the county to do it under the county government. It just doesn't. There's no provision to allow that to occur.

The providing of transcripts for an indigent are not part of the county budget process. If it were that, then the Supreme Court in Aranas would have qualified and provided for that procedure. They didn't do that.

Rather, respectfully, they in that pronouncement in Aranas and Cannady have said what Spann, the Court in Spann, or the Court in State versus

Norton felt to be an anomaly is in longer an anomaly. They made it clear. All indigents mean all indigents.

They didn't differentiate between indictable or non-indictable because, respectfully, the Legislature doesn't dissect between indictable or non-indictable any longer. They enacted an amendment which provides for the Public Defender Act to provide counsel services to indigent defendants on a Municipal Court setting. And they brought it down to that realm.

There is no Court rule or statute which requires county government to pay for transcript services as

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requested by the indigent defendants on these motions.

The cost of these transcripts can't be allowed to be absorbed in the county budget. Again, they can't be considered part and parcel of any Court's administrative operating expense. If that were the case, as I indicated before, the Court in Aranas or Cannady would have done that.

As I also indicated, the assignment of counsel is dealt with specifically by statute and court rule and the cases used by the Public Defender in that regard are distinguishable from this operative issue.

I believe that the Supreme Court

in Aranas has completed what was possibly a historical misunderstanding about the responsibility of what the law is under the Office of the Public Defender Act to the indigent defendant in the State of New Jersey.

I think it's now clear that once an indigent defendant is qualified, and it's not an automatic qualification because the Supreme Court in In re: Cannady and In re: Kauffman indicated that it was not an automatic right. The Public Defender still has the administrative ability to review cases on an ad hoc basis in terms of indigency and qualification under the Indigency Act.

The Supreme Court made it clear

that it was not an automatic right. There was a qualifier to it and that allows the Public Defender, once it's brought into the representation realm, or the responsibility realm, to decide whether or not this particular, any particular defendant qualifies for services under the law.

I think that that is very, very important because the Supreme Court is saying whether the Public Defender is in fact representing that individual or not the law and the rules provide the assigned counsel, once assigned, fall under the auspices of Aranas and Cannady.

I don't see, as the county's brief in both Phillipen and Gatti have

pointed out, the ability of the Court to dissect, or as the Public Defender has requested, the Court to dissect the responsibility of the Public Defender. If it were the case the Supreme Court would have done that in Aranas and Cannady, and they did not, they pointedly did not. They did not qualify whether an individual was indictable under Section 5 of the Public Defender Act or non-indictable under Section 5.2.

They had the perfect and absolute opportunity to make that distinguishment if they wanted to. And respectfully, your Honor, the Supreme Court did not. They made it clear under broad and pointed decision

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that the Public Defender Act does not -- strike that. They made it pointedly clear that the Public Defender Act is now the operative law in the State of New Jersey and that N.J.S.A. 2A:152-17, which predated the Public Defender Act, is now antiquated and obsolete.

It's very, very telling words by the Supreme Court. They didn't qualify anything. They made it absolutely clear what their pronouncement was. And respectfully, to not follow the pronouncement really misses the point of the opinion and the operative force of the opinion in both Arenas and Cannady. Thank you.

THE COURT: Thank you, Mr.

Bush. Mr. Harris?

MR. HARRIS: Judge, I'm just going to be brief. As your Honor indicated earlier before we started, this is revisiting this matter on several occasions.

As I sit here and I listen, I guess that's why we're all lawyers, because we can make these different arguments. But I feel like I'm Alice in Wonderland because it's like I fell through a hole and I don't know what's going on.

The Supreme Court has ruled in Arenas, Cannady, and Kauffman, there's no question in indictable matters the Public Defender's office is required to provide ancillary services:

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Transcripts, experts, whatever these services might be, if it is an indictable case.

What the county counsel says, though, is that they've taken Arenas and they've also applied that to Municipal Court matters based on the interpretation of the statute which requires the Public Defender's office to represent individuals charged in Municipal Court matters.

But what county counsel fails to advise the Court is that the Supreme Court had the perfect opportunity recently, within the last couple of months, to say that the Public Defender's office would be responsible for all Municipal Court matters and

would be responsible for ancillary services in Municipal Court matters, and they failed to do that.

But what the Supreme Court did say, and what they did rule, is that they said the system which we have used, which is assigning counsel on a rotating basis, and that counsel would do that pro bono and would not be reimbursed, is to continue, and we have an obligation as members of the Bar to provide that service to individuals who are charged with, we'll just call it cases of consequence in Municipal Court.

And they didn't say that the Public Defender is to represent those individuals based on the statute which

the Legislature passed and never funded.

They said: We will continue with the present system and we will maintain that system. And if the Public Defender is not required to provide representation, because that's a distinction on an indictable case, the Public Defender is required to provide representation.

What should be made clear, and what I know your Honor is aware of, is the Public Defender doesn't decide who is indigent and who is qualified for our services. That requirement, that obligation was taken away from the Public Defender's office by the Legislature, given to -- when I say

the assignment judge of each particular county, formally given to the assignment judge to set up a mechanism, which in this county is run through the Criminal Assignment office.

They determine indigency. They send the file to us after they have made that determination, clearly on indictable offenses. They review the file, they make that decision, they send it to us. We can't decide whether we can represent somebody or we can't represent somebody. So that should be made clear on the record.

But what is perfectly clear is when you cite Aranas, Cannady and Kauffman, they deal with indictable

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cases. They don't deal with Municipal Court matters, they don't deal with, I'll use a phrase quasi-criminal matters, they deal with indictable matters.

What the county counsel wants to do is he wants to extend the theory, the holding of Aranas and apply to extend the theory, the holding of Aranas and apply it to Municipal Court matters and require the Public Defender's office to pay for those costs of ancillary services, and that's just not what those cases say.

And what they failed to say to the Court, and which I believe is not appropriate, is they fail to advise your Honor that the, they pick and

they choose. They say there's the statute. Here's Aranas. But they don't give you the full picture and they don't put it in its proper context, and they don't look at: How do we deal with Municipal Court matters presently?

And when was the last time the Supreme Court made, quote, unquote, a pronouncement on Municipal Court matters? And that was within the last two months.

I apologize, Judge, because the name of the case --

THE COURT: Hadden versus Township of Dover.

MR. HARRIS: It slipped my

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mind. I remember it's from South Jersey. The Supreme Court decided it within the last few months, and they. specifically said in the last Municipal Court matters the Public Defender is not required.

We cannot be required to provide ancillary matters, whether experts or transcript, such as we are required to provide indictable cases.

But we can't mix apples and oranges together. They're two separate and distinct issues.

And that's why I say we've revisited it and we've argued it over and over. And we're back again today, and I suggest that your Honor's opinion, which you wrote on April

the 1st, 1992, on State versus Barbara Bush, is dispositive of this issue just as it was dispositive of Barbara Bush.

Thank you, Judge.

THE COURT: Thank you.

As counsel know, back in March, we had a number of cases argued in front of me dealing with the question of who would be responsible for paying for transcripts in cases involving indigent defendants in Municipal court who were entitled to have counsel assigned.

We had the question of transcripts at two levels. Indigent defendants with assigned counsel in municipal courts, have convictions entered

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against them in municipal courts, and they desire to appeal from those Municipal Court convictions to the Law Division. We need a transcript for that. Then, if there is an affirmance of the conviction in the Law Division and further appeal to the Appellate Division, there is a transcript, usually a very limited one, of the proceedings in the Law Division which is necessary for the Appellate Division proceedings.

So we have transcripts necessary sometimes with respect to Municipal Court proceedings and transcripts necessary sometimes with respect to Law Division proceedings, both involving indigent defendants

confronting motor vehicle or disorderly persons charges initially in Municipal Court.

We had a number of those cases. They were argued and it took me awhile to think about them, and I did on April 1, 1992, issue a letter opinion in a case called State versus Barbara Bush, appeal number 91-007. And, of course, both Mr. Bush and Mr. Harris have received copies of that opinion because they were involved in that case. I thought that was the end of the matter.

Now, it just so happened that coincidentally in other cases the Appellate Division rendered a very brief memorandum decision on an order

in both the John Pierre Phillipen case and the Joyce Gatti case.

The Appellate Division said in its April 2nd memorandum opinion the following with respect to the question of assignment of counsel and transcripts. "The motion to compel the Office of the Public Defender to assume the cost of transcript is denied without prejudice to make a motion in the first instance in the trial court on notice to the defendant and to the Public Defender. Jurisdiction is retained."

That order was entered in the Gatti case and a parallel order was entered in the Phillipen case.

Now, I think that when he had those orders from the Appellate

Division, the county counsel felt he had to revisit the matter in the Supreme Court. So it's not that he's sua sponte relitigating the same issue. He's gotten a direction from the Appellate Division.

It just so happens it's kind of an overlapping between my decision of this issue and the Appellate Division in the Gatti case and the Phillipen case remanding the matter to the trial court and directing county counsel to make the motion. So we're back looking at the situation there.

Now, I understand procedurally why the question is back before me. But the question is exactly the same as the question I decided on April 1,

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1992, in the case of State versus Barbara Bush. And I see no reason to depart from the opinion which I rendered in the Bush case.

Consequently, I now adopt in the Gatti case and in the Phillipen case my letter opinion in the Bush case, dated April 1, 1992, as my statement of reasons for denying the motion to compel the Office of the Public Defender to pick up the costs of the transcript. So I want you, if you will, please, to take that as the statement.

Now, I will just add to it very briefly because Mr. Bush did make an interesting argument and he revisited with some force the points which he

has said before.

The simple reality is that the cases of State versus Arenas, 126 New Jersey 501, Matter of Cannady, 126 New Jersey 486, and Matter of Kauffman, 126 New Jersey 499, all of which were decided on the same day, 1991, those cases do not apply to the question in front of me.

Aranas, Cannady and Kauffman all dealt with indigent defendants who were accused of indictable crimes.

It has been clear for the last, I guess, 30 years roughly, almost 30 years, if not 30 years, that the Public Defender is required to supply the defense for indigent defendants accused of indictable crimes. And the

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Public Defender has in fact been supplying that defense.

The Cannady, Aranas and Kauffman cases really dealt with ancillary service for indigents where, because of conflict rules, the Public Defender himself was not handling the case but pool attorneys were handling the case. That's broadly what was going on in those three cases. And the Court in those three cases said that the Public Defender, because he has by statute been given the fundamental responsibility for defending these indigents, must also supply the incidental and necessary related services, such as transcript costs, such as expert witness costs, that

kind of thing for indigent defendants on indictable crimes, even if the Public Defender is not actually handling the case himself, because of something like a conflict rule which required him to assign it out to a pool attorney, or where the person who is indigent and could have qualified for the Public Defender had a paid attorney because friends or relatives packaged money and retained them, still the Court said if they didn't have money to pay for things like expert fees and transcripts, the Public Defender had to pick them up.

Again, all as an indigent of the Public Defender's statutory responsibility to supply defense for

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indigent defendants accused of indictable crimes.

Now, there's some sweeping language in the Arenas, Cannady and Kauffman opinions about the responsibility of the Public Defender. But all of that language is to be read in the context of the crime being an indictable offense.

Now, switch gears. We are not here today dealing with indictable offenses. We are dealing with motor vehicle offenses where the defendant is indigent and where the consequence being visited upon the defendant is significant. That is to say, in each of these cases the --

Counsel, would you please,

counsel. I know you're talking very softly, but it's a little distracting.

All of these cases deal with, these two cases deal with indigent defendants who had their licenses revoked for periods of six months or so. And under existing case law they are entitled to have counsel assigned.

Now, there was a statute adopted a number of years ago. N.J.S.A. 2A:158A- 5.2, in which the Legislature purported to require the Public Defender to represent certain indigent defendants in Municipal Court. But the Legislature never funded that statute. Not just didn't fully fund it, it didn't fund it at all. Not a nickel was appropriated to fund that

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statute. And because of that, the statute has never been a functional living statute.

And in my written opinion, I cite the cases which hold that the statute is, in effect, a non-entity because of lack of funding. So it does not impose a burden on the Public Defender. It's a zero financial.

That means that we do not have any statutory rules in force with respect to representing indigent defendants in municipal courts or with respect to representing them in the Superior Court when they take an appeal to the Superior Court from a Municipal Court conviction. We don't have a statute.

We also don't have on the subject

of things such as transcripts any controlling case law. We now have all kinds of case law that tells us about assignment of counsel. The most recent case, of course, is Hadden versus Township of Delran, which was just decided this year, 1992, and is reported at 126 New Jersey 591.

But we do not have anything in the statute, we don't have any appellate case that I've been able to find that says who's supposed to pay for the transcripts in these cases.

Now, I will indicate now what I said in the written opinion in the Bush case.

Counsel, please don't rattle that paper. It's distracting.

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A VOICE: I'm sorry.

THE COURT: We just don't have any guideline. And so what we're thrown back to, I think, is trying to use our common sense.

We have for many years in this county assigned the responsibility for paying these transcripts to the county government. And we have done this on the general theory that county government is broadly responsible for funding the day-to-day operations of the Superior Court in this county.

Now, it's true that there are obvious important exceptions to that. The state government pays the judges' salaries in the Superior Court and it pays the salaries of certain key

managers.

But 80 percent of the operating costs of the support staff for the Superior Court in the counties is paid by county government. And it seems to me that furnishing transcripts to Municipal Court indigent defendants who are now by way of appeal in the Superior Court is an incident to the operation of the Superior Court in the county.

And I then think that the appropriate way to handle, to manage the payment of this cost is to treat it as a cost of, as an incident of funding the operations of the Superior Court. That is to say, in the past, I have for many years, and my

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predecessors as assignment judge for many years have required the county to pay these costs.

The question was brought before me for a conscious decision in the Bush case, and I said I think the general thinking is valid that we should treat this as an incidental part of the operation of the Superior Court, and we should put the burden on the county.

Now, the matter is obviously open to some debate. There is, of course, a great ongoing debate about whether the county should be paying for the courts at all, and there's a substantial movement in the Governor's office among the league of county

governments and the Legislature, there is a substantial movement to have the state take over the funding of state courts, and to get counties out of that business altogether.

Indeed, I understand that there's a fairly good chance that the Legislature will adopt a proposed constitutional amendment and submit it to the voters in November with respect to that. I think that's, as I understand it, very much a viable possibility.

Well, fine. So be it. I'm inclined to think it probably is a good idea to have the state government fund all of our operations, and maybe when they do, then we'll revisit this

if the legislation doesn't specifically say what to do, and then take another look at it.

But until either by constitutional amendment or by statute adopted by the State Legislature, or by a combination of both, until the funding of the superior courts is picked up at the state level as a full obligation of the state, as long as it remains an 80 percent obligation of the county government, I think we should continue to pay these transcript costs out of county funds as part of the operation of the courts.

I'm going to stay with my decision In the Bush case.

Incidentally, Mr. Bush, let me

make an offer to you. It's all being paid by the county, so it comes ultimately from the same general pocket. But in terms of annual operations by the county government, this has not been an item in the judicial budget.

I would be inclined, starting in 1993, if there is not a state take-over of funding before then, I think administratively I would be inclined to say that what we should do, and what I'll direct the Trial Court Administrator to do, is sit down with Mr. Appelt, get the figures how much this actually is going to cost.

It's been coming out of the general treasury, or out of your

budget, I'm not sure. When I say your budget, I mean county counsel's. I think it probably more sensibly should be shifted over and become a line item in the judicial budget. It's still paid by the county, but it would make more sense to do that.

I'm inclined starting with 1993 if there isn't a change in state funding as an administrative matter, I think we should perhaps pick this up and plug it directly into the judicial budget funded by the county as opposed to leaving it in the general county budget or wherever it is now.

I think that might make more sense. And if that would make people a little bit happier, I would be glad

to do it that way. I think it conceptually would make it easier.

For the time being, I'm going to leave it where it is, the general obligation for the county government for the rationale that I've expressed.

I'll sign the county -- the Criminal Division Manager has prepared the standard order in each of these cases assigning counsel and directing the county to pick up the cost of the transcripts. And I'll enter those orders, so you don't have to prepare an order.

MR. HARRIS: Judge --

THE COURT: Please, if you take an appeal from this, make as part of the record for appeal my decision

in the Bush case.

MR. HARRIS: What I was going to suggest, Judge, I have no problem with what your Honor just said. I have an extra copy of your Honor's opinion.

I was going to suggest that perhaps we can mark it J-1 or C-1, whichever might be appropriate, or if your Honor just simply says it's part of the record, which you have already done, there's no need to mark it.

THE COURT: It's part of the record in this case. And please call it to the attention of the Appellate Division if there is an appeal. I guess they will because they retained jurisdiction.

MR. HARRIS: Thank you.

MR. BUSH: Judge, if I may, two matters. If you'll recall, when State versus Barbara Bush was argued --

THE COURT: Right.

MR. BUSH: -- there was another matter submitted and argued also, and that was State versus Dotty Donofrio.

THE COURT: Didn't I decide that?

MR. BUSH: It was not encompassed in the April 1, 1992 decision. We haven't received an operative order on that.

THE COURT: You didn't? Okay. I thought I had disposed of it.

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I meant to.

MR. BUSH: Again, I felt uncomfortable.

THE COURT: I appreciate your calling it to my attention. I'll check it down and I'll dispose of it.

MR. BUSH: That's just for purposes of where we're going with these matters.

THE COURT: Okay. There were a whole, actually there were eight or nine that were pending at that time, and I thought I signed orders for all of them. But if I missed one, we'll dig it up. Dotty Donofrio?

MR. BUSH: Dotty Donofrio. I can supply the Court with the docket number, and I believe it was January 25.

THE COURT: Collin is sitting in the back, my law clerk, in the back of the room. Would you see him on your way out. We'll get focused on that.

MR. BUSH: Secondly, Judge, before you issued the April 1, 1992 opinion in State versus Bush, our office had submitted for the Court a rough analysis of previous years' costs.

THE COURT: Right.

MR. BUSH: And I just wanted to realert the Court to that.

THE COURT: Thank you.

MR. BUSH: And that was rough.

THE COURT: Yeah, I think what, as I say, if the state doesn't

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do something on funding, I think we administratively might handle this a little bit differently in 1993. I think we probably should put it in the judicial budget, or at least I'll propose that to the Freeholders.

Thank you.

MR. HARRIS: Thank you, your Honor.

MR. BUSH: Thank you.

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60a

C E R T I F I C A T E

I, TERENCE E. HEADD, Certified Shorthand Reporter of the State of New Jersey, certify the foregoing transcript to be a true and accurate record of the proceedings as taken stenographically by me on the date and place heretofore mentioned.

Terence E. Headd

TERENCE E. HEADD, C.S.R.
Cert. No. 575

Dated: May 27, 1992

61a

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
CASE NO.
APP. DIV. NO. A-1375-91T1

THE STATE OF NEW JERSEY, :
:
Complainant, :
: STENOGRAPHIC
: TRANSCRIPT
v. : OF
: PROCEEDINGS
:
JEAN PIERRE PHILLIPEN, :
:
Defendant. :
- - - - - - - - - - - - - - - -X

Morristown, New Jersey
June 26, 1992

B E F O R E:

THE HONORABLE REGINALD STANTON, A.J.S.C.

TRANSCRIPT ORDERED BY:

RONALD KEVITZ, ESQ.
First Assistant Morris County Counsel

A P P E A R A N C E S:

HOWARD F. APPELT, II, ESQ.
MORRIS COUNTY COUNSEL
BY: RONALD KEVITZ, ESQ.
First Assistant Morris County Counsel
Attorneys for County of Morris

WALTER J. PERELLI, C.S.R.

A P P E A R A N C E S (Cont'd):

MESSRS. MORRIS and HANTMAN
BY: ALLEN HANTMAN, ESQ.
Attorneys for Defendant Phillipen

OFFICE OF THE PUBLIC DEFENDER
BY: JOEL M. HARRIS, ESQ.
Attorney for Defendant Gatti

THE COURT: Are the parties here in State vs. Gatti and Phillipen?

MR. KEVITZ: I'm here. I don't know if anyone else is.

THE COURT: If you'll come up, please.

We'll do these together because they have the same issue. Okay?

MR. KEVITZ: Ron Kevitz, Assistant Morris County Counsel.

MR. HARRIS: Joel Harris on behalf of the Public Defender's office, your Honor.

MR. KEVITZ: Just very quickly, procedurally --

THE COURT: Mr. Hantman, did you want to be heard on this?

MR. HANTMAN: I don't want to be heard. I know I received calls from

the Appellate Division to find out when I'm getting the transcript because you assigned me as counsel fo Mr. Phillipen, and I just wanted to find out what's going to happen.

THE COURT: Fine.

Go ahead.

MR. KEVITZ: Your Honor, just procedurally, in March there were a number of cases heard by your Honor involving indigents in municipal courts. They basically, in an overview, involved the question of wh would pay for the cost of transcripts at the municipal court level then if they're appealed at the Law Division level.

THE COURT: Right.

MR. KEVITZ: In this case the

Appellate Division remanded back to this Court the motion to compel the office of the Public Defender to assume the costs. Your Honor rendered a decision on May 22nd. However, most respectfully -- and I do not want any negative impacts to my statement with the Public Defender who is overworked -- we received a letter brief 4:00 o'clock on the Thursday before the Friday morning, and it appeared as though part of your Honor's decision may have been influenced by that, and we just were asking for a reconsideration just so that we can attempt to further argue the one proposition, which is the fact that 1585.2 was never funded.

Despite the Public Defender not

citing the case, I believe the leadin
New Jersey case on this point -- and
it's quite strong in their argument -
is City of Camden vs. Byrne, which in
the most pertinent part very clearly
states, "The earlier statutes cannot
coexist with the enacted
appropriations and consequently must
be deemed to be suspended by the
adoption of the later acts."

However, what's unique in that case,
and as far as I know it has not been
addressed by the New Jersey courts, I
don't think that they've ever taken
into consideration one section of the
New Jersey Constitution, which is
Article IV, Section 7, paragraph 4,
which kind of in a nutshell says, any
bill must only affect one specific

title.

What is interesting though in the City of Camden case, they did cite a case from the State of Washington, which, of course, is not binding, has absolutely no effect on us, however, what makes it interesting, the State of Washington, very much like many other states, has similar provision to the New Jersey constitution which prohibits a bill from affecting more than one act at a time. Our basic argue is, if the appropriations bill in effect repealed 1585.2 by not putting the funding in place, every appropriations bill would, in effect, recodify the entire New Jersey statutes and would be in contravention of the New Jersey Constitution.

THE COURT: Well, not exactly, because there are many statutes that don't have any financial impact, at least no governmental financial impact. But it's true, in terms of the ones that require government funding, there could be problems.

MR. KEVITZ: Well, also then the appropriations bills wouldn't affect just appropriations, which would be in compliance with that section of the New Jersey Constitution, but they would be affecting many different bills all at once.

Without going over verbatim the case with the Washington Supreme Court, I know it gives a very interesting analysis, and it's Flanders vs. Morris and we wish to just bring this to your

attention; and also before we go to the Appellate Division, so that the reasoning, as I say, while it is not binding or precedential in any way, shape or form, it is an interesting argument. And as far as I know, I don't believe any New Jersey court case has specifically dealt with this one unique area: Whether or not an appropriations bill, if it does, in effect, supersede part of the statute is in violation of the New Jersey Constitution

Some of the other cases cited in City of Camden seem to affect the federal level where you can have a bill that affects more than one area.

Thank you, your Honor.

THE COURT: Thank you.

Mr. Harris?

MR. HARRIS: Judge, I have nothing to add.

We've gone over this time and time again. I realize that Mr. Kevitz was not here when we argued this motion, but Mr. Bush was. We argued this point. We discussed it, the County discussed it.

What count counsel fails to address and what we have failed to address time and time again -- and first it's one county counsel and then it's another county counsel -- is that Madden vs. Township of Delran, which is cited in your Honor's opinion of April the 1st of 1992 when you decided Barbara Bush, and what you referred to when you decided State vs. John

Phillipen and State vs. Joyce Gatti, and we have decided in issue. And it's gone over -- excuse me -- we've gone over it and we've gone over it, and it's more than a sense of deja vu, which I ask your Honor to simply say that your ruling which you reiterated on April 1st -- or excuse me -- which you gave on April 1st, your ruling which you reiterated on May 22nd is still appropriate at this time. And if the County Counsel wants to seek a review of that, then let them go to the Appellate Division. But to waste this Court's time with filing motions for reconsideration, with filing motions to have the same issue argued time and time again when this Court has already ruled on them I believe is

a waste of judicial time, and I'd ask your Honor to finally put this to rest.

THE COURT: Thank you.

I've considered this question of which governmental entity has the responsibility of funding the furnishing of transcripts for indigent defendants who appeal to the Law Division of the Superior Court from a conviction in the municipal court, and the related question of paying for transcripts of the same category of indigent defendants who appeal from a conviction in the Law Division of the Superior Court, to the Appellate Division of the Superior Court. The reality is that the Legislature has not fully thought through and

implemented its thinking in this area.

There is a statute which we discussed at length in previous decisions, in which the Legislature ostensibly commits the State to the policy of having the Public Defender supply a defense for indigent municipal court defendants, and supplying the defense would undoubtedly include also doing things like taking care of transcript costs and furnishing expert witnesses and the rest of it.

The statute has laid on the books for I don't know how many years now, something like fifteen, maybe it's more than that. It has never been funded, so it has simply never become a reality. Meanwhile, throughout this

state by the thousands, every year indigent defendants are being -- by the tens of thousands -- indigent defendants are being processed through the municipal courts and they are taking appeals, some of them, from municipal court decisions to the Superior Court. The Supreme Court has exhaustively considered the question of representation by counsel of those indigent defendants.

It has ruled as recently as 1991 that the Public Defender is not responsible for defending those defendants; that essentially the private bar on a pro bono basis is to be charged with the responsibility of representing those defendants, and the assignment judges are directed by the

Court, Supreme Court, to work out a mechanism for doing it, and we're given pretty tight guidelines for the mechanism.

So the Court, the Supreme Court has expressed itself very, very clearly in a way that is absolutely beyond my having anything to say or do about it, that the responsibility for actually defending indigent defendants is not with the Public Defender's office. And for many, many years now, certainly for all of the six years where I have been Assignment Judge, I have every year been assigning in this county more than a thousand cases a year to members of the private bar.

Now, there's a much smaller number of cases where there's an appeal from

an indigent defendant's conviction in the municipal court. I have always required the County to pay that cost. I have done that because, in my judgment, there being no effective statute in place for the funding of the defense of these defendants, either by way of counsel or by way of related costs such as transcript costs, I have gone back on the basic theory that the responsibility should be where the general responsibility for funding the justice system lies at this level of operation. And since the time when New Jersey became a state in 1776, the basic responsibility for funding the criminal justice system has rested with the counties.

So I have decided that the most sensible thing to do is to follow that basic way of funding. That is why I have directed the county to do that. None of the recent Appellate Division or Supreme Court decisions with respect to the furnishing of ancillary services, like expert witnesses, transcripts to Superior Court indigent defendants charged with crimes who are effectively covered by the Public Defender, even though some of the work is farmed out, none of those cases are applicable. There simply is no controlling state law, decisional law on what should be done about funding a transcript cost of indigent defendants.

I am fashioning, as best I can, a

remedy. I have reiterated a number of times my rationale for doing that. There are about eight cases up on appeal from my decision before the Appellate Division, and I'm not going to do anything more about it until the Appellate Division either affirms what I have done or reverses what I have done. I've gone as far as I can.

I do not think that this new argument that we're dealing here with, either a doctrine of repeal of one statute by another by implication; or the concept that under the state Constitution a bill is supposed to deal with only one subject and not with a multiplicity of subjects; I don't think those concepts are applicable. We're not talking about

the repeal of a statute in terms of the long-standing doctrine and problems about implied repeals of statutes. The reality is, the statute is not so much that it's been repealed, it's not be repealed, it's still on the books, it still presumably represents the theoretical policy of this State, but it hasn't been funded. It is not a reality. There is nothing that can be done about it.

The Public Defender cannot undertake defenses if it has no resources at all. It's not a question of apportioning resources. He has no resources given to him, zero resources for doing this job, so he can't do it. I don't know, I don't regard that as

repeal of a statute by implication, I regard that as nonexistence of a statute. And the problem remains that the people have to be defended, they have a constitutional right to be defended. We have -- and the Supreme Court has fashioned the basic remedy, I have filled in one of the gaps in it, that's all I'm doing. That's it. You'll have to get the Appellate Division or the Supreme Court to take it beyond that, Mr. Kevitz. Good luck.

Incidentally, I don't really care how it's done, there are lots of ways of doing it, but it's beyond my control.

Get Mr. Hantman his transcript. Now, please, these cases have to be

processed. If the Appellate Division or the Supreme Court eventually changes things around, well then you'll have to pursue your money from the Public Defender or from some other governmental funding source. In the meanwhile I want the County to honest to goodness buy these transcripts now.

MR. KEVITZ: I don't think that will be a problem. We can work something out.

THE COURT: Fine.

MR. KEVITZ: I had submitted an order. I have another copy here.

THE COURT: Thank you.

If you want to wait a minute, we'll give you a copy of the order.

MR. HARRIS: Yes, sir.

(Proceedings concluded.)

* * *

I, Walter J Perelli, a Certified Shorthand Reporter and Official Court Reporter within and for the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcription of my stenographic notes to the best of my ability.

Dated: July 27, 1992

WALTER J. PERELLI, C.S.R.
Lic. No. 785

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for the President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, having previously taken an oath, as a member of Congress, or an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Content and title of laws; laws adopting compilations or revisions of statutes

4. To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other every law shall embrace but one object and that shall be expressed in the title. This paragraph shall not invalidate any law adopting or enacting a compilation, consolidation, revision, or rearrangement of all or parts of the statutory law.

2A:158A-5.2 Offenses and violations; legal representation

The Public Defender shall in the manner prescribed by P.L. 1967, c. 43 (C. 2A:158A-1 et seq.) provide for legal representation of any person charged with disorderly persons offense or with the violation of any law, ordinance or regulation of a penal nature where there is likelihood that the persons so charged, if convicted will be subject to imprisonment or, in the opinion of the court, any other consequence of magnitude.

2A:158A.5 Duties of public defender

It shall be the duty of the Public Defender to provide for the legal representation of any indigent defendant who is formally charged with the commission of an indictable offense.

All necessary services and facilities of representation (including investigation and other preparation) shall be provided in every case.

Representation as herein provided for shall include any direct appeal from conviction and such post-conviction proceedings as would warrant the assignment of counsel pursuant to the court rules.

Representation for indigent defendants (a) may be provided in any Federal court in any matter arising out of or relating to an action pending or recently pending in a court of criminal jurisdiction of this State and (b) may be provided in any Federal court in this State where indigent defendants are charged with the commission of a Federal criminal offense and where the representation is under a plan adopted pursuant to the Criminal Justice Act of 1964 (18 U.S.C. 3006A)1

967, c. 43, § 5, eff. July 1, 1967.

U.S.C.A. §5, eff. July 1, 1967.

39:4-50. Operating or allowing operation by person under influence of liquor or drugs; penalties, alcohol education or rehabilitation; collection of driver's license; rights of discovery; intoxicated driver resource centers

(a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood, shall be subject:

(1) For the first offense, to a fine of not less than $250.00 nor more than $400.00 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate

a motor vehicle over the highways of this State for a period of not less than six months nor more than one year.

SUPERIOR COURT OF NEW JERSEY

Reginald Stanton

Courthouse
P.O. Box 900
Morristown, New Jersey 07963-0900
(201) 285-6414

MORRIS AND SUSSEX COUNTIES

August 7, 1992

Howard F. Appelt II, Esq.
Morris County Counsel
CN 900
Morristown, New Jersey 07963-0900

Joel M. Harris, Esq.
Deputy Public Defender
24 Washington Street
Morristown, New Jersey 07960

Re: Indigent Defendants, Transcripts on Appeal

Dear Mr. Appelt and Mr. Harris:

You have been before me on a number of occasions dealing with the question of who should pay various costs associated with appeals taken by indigent criminal defendant. I am not sure whether we have focused during those proceedings on the contents of Rule 3:23-8(a). I refer in particular to the next to last sentence in that Rule: "If the appellant, upon application to the court appealed to, is found to be indigent, the court shall order the transcript of the proceedings below furnished at the county's expense if the appeal involves violation of a statute and at the municipality's expense if the appeal involves violation of an ordinance."

My general recollection is that I haven't previously focused on that Rule in dealing with this problem. It so happens that because of my evaluation of the general responsibility of the county for certain costs of the criminal justice system that I have been imposing on the county the cost of paying for the transcripts of indigent defendants appealing from municipal court convictions to the Law Division, and I have also been imposing those costs when the same municipal indigent defendant takes an appeal from a decision of the Law Division to the Appellate Division. Virtually all of the appeals we deal with involve a violation of a state statute rather than a municipal ordinance. It seems to me that the cited Rule gives very clear direction with respect to the obligation to pay for transcripts.

It may be that one or both of you have previously cited Rule 3:23-8(a) to me, and it may be that I have previously referred to it in rendering decisions. However, the Rule was called to my attention by a colleague today, and when he called my attention to it I did not remember having adverted to that Rule on any previous occasion. Perhaps I have dealt with the Rule and have now forgotten that I have dealt with it, but I think my attention was called to it today for the first time. In any event, I am calling your attention to the Rule just in case we have all missed it in the past.

Very truly yours,

/s/Reginald Stanton
Judge of the Superior Court
Assignment Judge

RS:amg
275-92

3:23-8. Hearing on Appeal

(a) Plenary Hearing; Hearing on Record; Correction or Supplementation of Record; Transcript for Indigents. If a verbatim record or sound recording was made pursuant to R. 7:4-5 in the court from which the appeal is taken, the original transcript thereof duly certified as correct shall be filed by the clerk of the court below with the county clerk, and a certified copy served on the prosecuting attorney by the clerk for the court below within 20 days after the filing of the notice of appeal or within such extension of time as the court permits. In such cases the trial of the appeal shall be heard de novo on the record unless it shall appear that the rights of either party may be prejudiced by a substantially unintelligible record or that the

rights of defendant were prejudiced below in which event the court to which the appeal has been taken may either reverse and remand for a new trial or conduct a plenary trial de novo without a jury. The Court shall provide the municipal court with reasons for the remand. The court may also supplement the record and admit additional testimony whenever (1) the municipal court erred in excluding evidence offered by the defendant, (2) the state offers rebuttal evidence to discredit supplementary evidence admitted hereunder, or (3) the record being reviewed is partially unintelligible or defective. If the appellant, upon application to the court appealed to, is found to be indigent, the court shall order the transcript of the proceedings below furnished at the county's

expense if the appeal involves violation of an ordinance. If no such record was made in the court from which the appeal is taken, the appeal shall operate as an application for a plenary trial de novo without a jury in the court to which the appeal is taken.

MORRIS COUNTY'S BRIEF IN SUPPORT OF RECONSIDERATION

POINT II

DESPITE THE OFFICE OF THE PUBLIC DEFENDER'S INDICATION THAT FAILING TO APPROPRIATE A STATUTE REPEALS THE STATUTE IN QUESTION, MORRIS COUNTY CONTENDS THAT SUCH REASSIGNING IS IN VIOLATION OF THE CONSTITUTION OF THE STATE OF NEW JERSEY AND THE UNITED STATES CONSTITUTION

Despite the OPD's argument concerning the anomaly of lack of funding of N.J.S.A. 2A:158A-5.2, the OPD did not cite the leading New Jersey case for the premise that the failure to appropriate suspends a statute, City of Camden vs. Byrne, 82 N.J. 136, 154 (1980). In the City of Camden vs. Byrne, supra, (hereinafter Camden) our Supreme Court did address the issue of the effect of nonfunding of a statute under an appropriations bill. Nevertheless, neither that case, nor any other New Jersey case that this writer is aware of, addresses the constitutionality pursuant to Article 4 Section 7 Paragraph

4 of the New Jersey Constitution (hereinafter Article 4) of an appropriations bill repealing a statute due to nonfunding, such as N.J.S.A. 2A:158A:5.2.

The New Jersey Supreme Court clearly found in the Camden Case supra at page 154 that:

> "Although there generally exists a strong presumption against any implied negation of statutory enactments, this presumption may be overcome when there is a clear showing that two legislative measures are patently repugnant or inconsistent.... The earlier statutes cannot coexist with the enacted appropriation and, consequently, must be deemed to be suspended by adoption of the later acts. Bruck v. The Credit Corp., 3 N.J. 401, 408-409 (1950); see United States v. Dickerson, 310 U.S. 554, 555-556, 60 S. Ct. 1034, 1035, 84 L.Ed. 1356, 1359 (1940) (statute providing for reenlistment bonus suspended by subsequent failure to appropriate); Friends of the Earth v. Armstrong, 485 F.2d 1, 8---9 (10 Cir. 1973), cert. den. 414 U.S. 1171, 94 S. Ct. 933, 39 L.Ed.2d 120 (1974); contra, Flanders v. Morris, 88 Wash. 2d 183, 558 P.2d 769 (S.Ct. 1977) (appropriation bill cannot "abolish" existing law).

We thus conclude that, in addition to the

> insurmountable constitutional obstacles which prevent appellants from securing funds under the several statutes, the Legislature itself has expressed its intent with sufficient clarity to render it singularly inappropriate for this Court to give any legal effect whatsoever to the earlier statutory enactments."

Unfortunately, a review of the cases cited by our Supreme Court in the Camden case, supra at 154 indicate that none of them address the argument that the appropriation bill, if it suspended law, or repealed a statute, would not be in violation of the New Jersey Constitution. However, an extremely interest argument is made in Flanders v. Morris, 558 P.2d 769 (1977) cited in the Camden case, supra at 155 where the Washington Supreme Court found that an appropriation bill cannot abolish existing law based upon the Washington State Constitution. The Washington Supreme Court clearly found in Flanders v. Morris, supra:

> ..."It is obvious why a legislator would hesitate to hold up the funding of the entire state government in order to prevent the enactment of a certain provision, even though he would have voted against it if it had been presented as independent legislation.

Article 2, section 19 of our state constitution has a dual purpose: (1) to prevent "logrolling", or pushing legislation through by attaching it to other necessary or desirable legislation, and (2) to assure that the members of the legislature and the public are generally aware of what is contained in proposed new laws. In State ex rel. Washington Toll Bridge Authority v. Yelle, 54 Wash.2d 545, 550-51, 342 P.2d 588, 591 (1959), we quoted language which explains the need for this constitutional provision:..."

An appropriations bill which "defines no rights" certainly cannot abolish or amend existing law. It cannot add restrictions to public assistance eligibility and still be said to define no rights. The proper legislative procedure is to enact separate, independent, properly titled legislation....

We next deal with the constitutional challenge made under const. art. 2, section 37. The reason for requiring amendatory legislation to set out the statute in full was stated in the 1959 Washington Toll Bridge Authority case, quoting from state ex rel. Gebhardt v. Superior Court, 15 Wash. 2d 673, 685, 131 P.2d 943, 949 (1942):

> 'The section of our constitution above referred to was undoubtedly framed for the purpose of avoiding confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and

> disconnected legislative provisions, original and amendatory, scattered through different volumes or different protions of the same volume. Such a provision, among other things, forbids amending a statute simply by striking out or inserting certain words, phrases or clauses, a proceeding formerly common, through which laws become complicated and their real meaning often difficult of ascertainment. The result desired by such a provision is to have in a section as amended a complete section, so that no further search will be required to determine the provisions of such section as amended.'"

Our New Jersey Constitution, very much like the Washington Constitution, and many other State Constitutions, and unlike the United States Constitution, contains a constitutional provision that prevents "logrolling". That section of the constitution is Article 4 Section 7 Paragraph 4 which clearly states:

> "To avoid improper influence which may result from intermixing in one and the same act such things as have no proper relation to each other,

> every law shall embrace but one object, and that shall be expressed in the title. This paragraph shall not invalidate any law adopting or enacting a compilation, consolidation, revision, or rearrangement of all or parts of the statutory law."

It is respectfully submitted that the provisions of Article 4 were not addressed by this Court, or by our Supreme Court, in Camden, supra. It is also respectfully submitted that the decision of this Court while properly based upon the issues litigated in the Camden case, supra, should be reexamined in light of the Constitutional requirements of Article 4.

If an appropriations bill, can in one fell swoop, as is indicated in the previous New Jersey decisions, suspend legislation, unsuspend other legislation, and repeal bills, then the New Jersey Legislature is not merely acting in violation of Article 4, but in oen simple act, by the adoption of an appropriation bill, is recodifing the entire State of New Jersey each year. Such an intepretation of the effect of an appropriations bill was exactly what was being disapproved by the Constitutional enactment of Article 4.

Finally, it is submitted by Morris County that the Court's ruling (Exhibit A) is additionally a violation of Amendment XIV of the United State Constitution, since it is a deprivation of property, i.e., the funds of Morris County, without due process of law, since, as previously argued, the repeal of N.J.S.A. 2a:158a:5-2 by an appropriations bill is prohibited and in violation of the New Jersey Constitution.

For the foregoing reasons it is respectfully requested that this Court grant the relief requested by the County of Morris.

Respectfully submitted,

Howard F. Appelt, II
Morris County Counsel

/s/_____
By: Ronald Kevitz
First Assistant Morris County Counsel

Dated: June 1, 1992

PORTION OF MORRIS COUNTY'S BRIEF ON XIV AMENDMENT ISSUE BEFORE APPELLATE DIVISION, SUPERIOR COURT NEW JERSEY

POINT II

THE TRIAL COURT'S DECISION THAT LACK OF FUNDING OF N.J.S.A. 2A:158A-5.2 VOIDS THE PUBLIC DEFENDER'S DUTY TO SUPPLY REPRESENTATION IS CONTRARY TO THE NEW JERSEY CONSTITUTION AND THE UNITED STATES CONSTITUTION

Despite the trial court's decision concerning the anomaly of lack of funding of N.J.S.A. 2A:158A-5.2 (RMCa136-11; RMCa137-5 and RMCa138-1; RMCa140-10), it is respectfully submitted that the trial court's decision did not give proper deference to the leading New Jersey case for the premise that the failure to appropriate suspends a statute, City of Camden vs. Byrne 82 N.J. 133, 154 (1980), and its effect on the case at bar. Instead, the trial court merely found that the nonfunding of N.J.S.A. 2A:158A-5.2 imposed no duty on the OPD (RMCa136-22).

In the City of Camden vs. Byrne, supra, (hereinafter Camden) our Supreme Court did address the issue of the effect of nonfunding of a statute under an appropriations bill. Nevertheless, neither that case, nor any other New Jersey case that this writer is aware of, addresses the constitutionality pursuant to Article 4 Section 7 Paragraph 4 of the New Jersey Constitution (hereinafter Article 4) of an appropriations bill repealing a statute due to nonfunding, such as N.J.S.A. 2A:158A-5.2.

The New Jersey Supreme Court clearly found in the Camden Case supra at pages 154-155 that:

> "Although there generally exists a strong presumption against any implied negation of statutory enactments, this presumption may be overcome when there is a clear showing that two legislative measures are patently repugnant or inconsistent....The earlier statutes cannot coexist with the enacted appropriation and, consequently, must be deemed to be suspended by adoption of the later appropriation acts. Bruck v. The Credit Corp., 3 N.J. 401, 408-409 (1950); see United States v. Dickerson, 310 U.S. 554, 555-556, 60 S. Ct. 1034, 1035, 84 L.Ed. 1356, 1359 (1940) (statute providing for

reenlistment bonus suspended by subsequent failure to appropriate); Friends of the Earth v. Armstrong, 485 F.2d 1, 8-9 (10 Cir.1973), cert. den. 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120 (1974); contra, Flanders v. Morris, 88 Wash. 2d 183, 558 P.2d 769 (S. Ct. 1977) (appropriation bill cannot "abolish" exisitng law).

> We thus conclude that, in addition to the insurmountable constitutional obstacles which prevent appellants from securing funds under the several statutes, the Legislature itself has expressed its intent with sufficient clarity to render it singularly inappropriate for this Court to give any legal effect whatsoever to the earlier statutory enactments."

Unfortunately, a review of the cases cited by our Supreme Court in the Camden case, supra at 154 indicate that none of them address the argument that the appropriation bill, if it suspended law, or repealed a statute, would not be in violation of the New Jersey Constitution. However, an extremely interesting argument is made in Flanders v. orris, 558 P.2d 769 (S. Ct. 1977) cited in the Camden case, supra at 155 where the Washington Supreme Court found that an appropiration bill cannot abolish existing law based upon the Washington State Constitution. The Washington State Supreme

Court clearly found in Flanders v. Morris, supra at pages 772 and 773:

> ..."It is obvious why a legislator would hesitate to hold up the funding of the entire state government in order to prevent the enactment of a certain provision, even though he would have voted against it if it had been presented as independent legislation.
>
> Article 2, section 19 our our state constitution has a dual purpose: (1 to prevent "logrolling", or pushing legislation through by attaching it to other necessary or desirable legislation, and 2) to assure that the members of the legislature and the public are generally aware of what is contained in proposed new laws. In State ex rel. Washington Toll Bridge Authority v. Yelle, 54 Wash.2d 545, 550-51, 342 P.2d 588, 591 (1959), we quoted language which explains the need for this constitutional provision:..."
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> An appropriations bill which "defines no rights" certainly cannot abolish or amend existing law. It cannot add restrictions to public assistance eligibility and still be said to define no rights. The proper legislative prcedure is to enact separate, independent, properly titled legislation...
>
> We next deal with the constitutional challenge made under Const. Art. 2, section 37. The reason for requiring amendatory legislation to set out the statute in full was stated in the 1959

Washington Toll Bridge Authority case, quoting from State ex rel. Gebhardt v. Superior Court, 15 Wash. 2d 673, 685, 131 P.2d 943, 949 (1942):

> 'The section of our constitution above referred to was undoubtedly framed for the purpose of avoiding confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes or different portions of the same volume. Such a provision, among other things, forbids amending a statute simply by striking out or inserting certain words, phrases or clauses, a proceeding formerly common, through which laws become complicated and their real meaning often difficult of ascertainment. The result desired by such a provision is to have in a section as amended a complete section, so that no further search will be required to determine the provisions of such section as amended.'"

Our New Jersey Constitution, very much like the

Washington Constitution, and many other State Constitutions, and unlike the United States Constitution, contains a constitutional provision that prevents "logrolling". That section of the Constitution is Article 4 Section 7 Paragraph 4 (Article 4) which clearly states:

> "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title. This paragraph shall not invalidate any law adopting or enacting a compilation, consolidation, revision, or rearrangement of all or parts of the statutory law."

It is respectfully submitted that the provisions of Article 4 were not addressed by this Court, or by our Supreme Court, in Camden, supra. It is also respectfully submitted that the decision of this Court while properly based upon the issues litigated in the Camden case, supra, should be reexamined in light of the Constitutional requirement of Article 4.

If an appropriations bill, can in one fell swoop, as is indicated in the previous New Jersey decisions, suspend

legislation, unsuspend other legislation, and repeal bills, then the New Jersey Legislature is not merely acting in violation of Article 4, but in one simple act, by the adoption of an appropriation bill, is recodifying the entire State of New Jersey each year. Such an intepretation of the effect of an appropriations bill was exactly what was being disapproved by the Constitutional enactment of Article 4.

Additionally, while City of Camden v. Byrne, 82 N.J. 133 (1980) may stand for the premise that the failure to appropriate suspends a statute, that case must be reconciled with the later decision by our Supreme Court in Div. of Youth & Family Services v. D.C., , 118, N.J. 388, 399-400 1990) which further clarified the holding in Camden and held:

> "As we stated in City of Camden v. Byrne, 82 N.J. 133, 148-49, 411 A.2d 462 (1980):
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> > "New Jersey courts have consistently adhered to the principle that the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government.

> There can be no redress in the courts to overcome either the Legislature's action or refusal to take action pursuant to its constitutional power over state appropriations. (Citations omitted)....
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> That principle is qualified, however, when funds are constitutionally mandated. Robinson v. Cahill. 67 N.J. 333, 354-55, 339 A.2d 193, cert. denied, 423 U.S. 913, 96 S.Ct. 217, 46 L.Ed.2d 141 (1975)...."

Such is the case at bar N.J.S.A.2A:158-5.2's funding is constitutionally mandated in order to provide constitutionally mandated legal services for indigents. Those services are not a luxury item, but a service required by the United States and New Jersey Constitution, in order to comply with the most fundamental due process right, the right of adequate counsel.

Finally, it is submitted by Morris County that the Law Division's ruling is additionally a violation of Amendment XIV of the United States Constitution, since it is a deprivation of property, i.e., the funds of Morris County, without due process of law, since, as previously argued, the repeal of N.J.S.A.

2A:158A-5.2 by an appropriation bill is prohibited and in violation of the New Jersey Constitution and case law of Div. of Youth & Family Serv. v. D.C., supra.

PORTION OF MORRIS COUNTY'S BRIEF ON XIV AMENDMENT ISSUE BEFORE SUPREME COURT OF NEW JERSEY

POINT IV

THE TRIAL COURT'S DECISION THAT LACK OF FUNDING OF N.J.S.A. 2A:158A-5.2 VOIDS THE STATE OF NEW JERSEY'S DUTY TO PAY FOR CHANCERY DIVISION COURT COSTS IS CONTRARY TO THE NEW JERSEY CONSTITUTION AND THE UNITED STATES CONSTITUTION

Despite the trial court's decision concerning the anomaly of lack of funding of N.J.S.A. 2A:158A-5.2 (RMCa136-11; RMCa137-5 and RMCa138-1; RMCa140-10), it is respectfully submitted that the trial court's decision did not give proper deference to the leading New Jersey case for the premise that the failure to appropriate suspends a statute, City of Camden vs. Byrne 82 N.J. 133, 154 (1980), and its effect on the case at bar. Instead, the trial court merely found that N.J.S.A. 2a:158a-5.2 imposed no duty on the OPD (RMCa136-22).

In the City of Camden v. Byrne, supra, (hereinafter

Camden) our Supreme Court did address the issue of the effect of nonfunding of a statute under an appropriations bill. Nevertheless, neither that case, nor any other New Jersey case that this writer is aware of, addresses the constitutionality pursuant to Article 4 Section 7 Paragraph 4 of the New Jersey Constitution (hereinafter Article 4) of an appropriations bill repealing a statute due to nonfunding, such as N.J.S.A. 2a:158a-5.2.

The New Jersey Supreme Court clearly found in the Camden Case supra at pages 154-155 that:

> "Although there generally exists a strong presumption against any implied negation of statutory enactments, this presumption may be overcome when there is a clear showing that two legislative measures are patently repugnant or inconsistent....The earlier statutes cannot coexist with the enacted appropriation and, consequently, must be deemed to be suspended by adoption of the later appropriation acts. Bruck v. The Credit Corp., 3 N.J. 401, 408-409 (1950); see United States v. Dickerson, 310 U.S. 554, 555-556, 60 S.Ct. 1034, 1035, 84 L.Ed. 1356, 1359 (1940) (statute providing for reenlistment bonus suspended by subsequent failure to appropriate); Friends of the Earth v.

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and unlike the United States Constitution, contains a constitutional provision that prevents "logrolling". That section of the Constitution is Article 4 Section 7 Paragraph 4 (Article 4) which clearly states:

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Finally, it is submitted by Morris County that the Law Division's ruling is additionally a violation of Amendment XIV of the United States Constitution, since it is a deprivation of property, i.e., the funds of Morris County, without due process

of law, since, as previously argued, the repeal of N.J.S.A. 2a:158A-5.2 by an appropriations bill is prohibited and in violation of the New Jersey Constitution and case law of Div. of Youth & Family Serv. v. D.C., supra.

To deny certification, will leave open the effect of Div. of Youth & Family Serv. v. D.C., supra in Constitutional settings requiring funding, a matter of the gravest public importance.

93-1255

Supreme Court, U.S.
FILED
FEB 25 1994
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED
STATES OF AMERICA

OCTOBER TERM, 1993

COUNTY OF MORRIS,

Petitioner,

v.

JEAN PIERRE PHILIPPEN,

Respondent.

MEMORANDUM OPPOSING CERTIORARI

Respondent, the New Jersey Office of the Public Defender, represents to the court as follows:

1. In the New Jersey courts this case was a dispute between the Morris County government and the state Office of the Public Defender over which of them must pay for transcripts for an indigent defendant appealing a municipal court conviction. The issue presented required the reviewing courts -- the New Jersey Superior Court, Appellate Division and the New Jersey Supreme Court -- to apply the Public Defender Act, N.J.S.A. 2A:158A-1 *et seq.*, and Supreme Court cases construing it. Petitioner, the County of Morris, lost the dispute over statutory construction and now seeks to carry it to this Court. Because Morris County fails to state any genuine federal claim, the petition for writ of *certiorari* must be denied.

2. In Point I petitioner takes issue with New Jersey court decisions holding that the Public Defender has no obligation to provide any services to municipal defendants because of the legislature's failure to fund the portion of the Public Defender Act that purports to impose that obligation, N.J.S.A. 2A:158A-5.2. The petition contends that these decisions violate the New Jersey Constitution (Pet. 26-36) and that New Jersey courts' failure to "follow" "written law" constitutes a denial of the right to due process of law under the federal constitution (Pet. 36, 38-39). Petitioner cites to no case, and respondent has found none, holding that the Due Process clause of the Fourteenth Amendment protects governmental agencies against actions by other governmental agencies; this Court has specifically held that the states are not "persons" within the meaning of the Due Process clause of the Fifth Amendment. South Carolina v. Katzenbach, 383 U.S. 310, 323-24

(1966). Petitioner has failed to state a valid federal claim in Point I.

3. In addition, as petitioner has recast the claim in seeking this Court's review, it appears that the State of New Jersey should be named as a respondent.

4. In Point II petitioner does not even attempt to state a federal claim. It argues simply that its interpretation of the Public Defender Act should override a New Jersey court rule (Pet. 40-42).

Because the case involves no plausible basis for this Court's review, let alone any matter of national importance, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

CLAUDIA VAN WYK
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(201) 877-1200

DATED: **February 25, 1994**